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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

KESHARA SHAW et al.,

Plaintiffs,

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT, AUSTIN BEUTNER, Los Angeles Unified School District Superintendent, and DOES 1-25,

Defendant, and

UNITED TEACHERS LOS ANGELES,

Relief Defendant.

CASE NO. 20STCV36489

UTLA'S OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION FOR EXPEDITED DISCOVERY IN SUPPORT OF PRELIMINARY INJUNCTION MOTION

Judge: Hon. Yvette Palazuelos
Hearing Date: December 1, 2020
Time: 8:30 a.m.
Dept.: 9

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INTRODUCTION

UTLA opposes Plaintiffs' *ex parte* application because they have not satisfied the requirements of Rule of Court 3.1200, and because there is not a sound basis upon which to proceed with a preliminary injunction motion or a class action in this case, let alone to do so on an expedited basis skipping over the significant defects in this action that are subject to demurrer[1] and motions to strike.

The COVID-19 pandemic has caused stress upon education systems and resources everywhere in this country and this state, not least of all in Los Angeles. Some fifty million K-12 students nationwide were unable to participate in in-person learning as the pandemic raged this past spring.[2] As of this writing, the infection numbers in the County are once again on a dramatic rise, and seem likely to continue to increase as millions of people travel – against the advice of the CDC -- for the Thanksgiving holiday.[3]

But the answer to, or remedy for, that stress and inevitable regrettable learning loss[4] is not to rush headlong past the pending litigation stay order to obtain discovery purportedly in support of an injunction erasing a Sideletter entered into by the Los Angeles Unified School District ("LAUSD" or "District") and Relief Defendant United Teachers-Los Angeles ("UTLA" or "Union"), as Plaintiffs have requested. That Sideletter agreement

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[1] UTLA has notified the parties of its intention to file a demurrer and motion to strike, and engaged in a telephonic "meet and confer" session with Plaintiffs' counsel on November 10 that did not yield an agreement obviating the need to file that motion. UTLA did not file the motion because the court clerk advised it that it could not do so pursuant to the stay.

[2] Taylor Chapman, "Pros and Cons in the Transition to Remote Learning Due to COVID-19", https://thesciencesurvey.com/news/2020/05/13/pros-and-cons-in-the-transition-to-remote-learning-due-to-covid-19/ (May 13, 2020).

[3] Hawkins, Knowles, "As U.S. coronavirus cases soar toward 200,000 a day, holiday travel is surging" https://www.washingtonpost.com/health/2020/11/21/coronavirus-thanksgiving-travel/ Washington Post, 11/21/20.

[4] Greg Mullen, Maslow before Bloom, https://www.exploringthecore.com/post/maslow-before-bloom (Apr.il 3, 2020) (Discussing the pandemic's impact on the tradeoff between basic human needs as expounded by one 20th Century psychologist (Abraham Maslow), and the advancement of educational development as explained by another (Benjamin Bloom)).

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is the lawful product of an effort by the parties to respond to an unprecedented dynamic, fluid and dire situation, and to define educators' roles in these circumstances, but it by no means represents the entirety of the District's program. The Sideletter itself is neither unlawful nor an impediment to whatever relief this Court may legitimately order, if any.

Nor is a class action representing some 500,000 District students an appropriate mechanism to attempt to discern and if needed, correct the statutory or constitutional flaws there may be in the District's response to the pandemic, because that response is experienced uniquely by each individual student, which in turn is the case because there is no uniform policy that impacts the class, and the First Amended Complaint ("FAC") alleges individual combinations of alleged harm to each of the nine named plaintiffs, combinations that would likely find no significant commonality amongst the entire disparate LAUSD student population.

The stay issued by this Court on November 17 is in keeping with" the discharge of its responsibilities to manage the massive issues and problems presented by . . . this complex litigation". *Highland Stucco v. Superior Court*, 222 Cal. App. 3d 637, 644 (1990).

Cases cited by Plaintiffs in support of expedited injunctive relief, *Butt v. State of California*, 4 Cal. 4th 668 (1992), and *American Indian Model Schools v. Oakland Unified School Dist.*, 227 Cal. App. 4th 258 (2014), do not support Plaintiffs' request to rush the adjudication in this case. *Butt* involved the simple (albeit devastating) closure of an entire school district prior to the scheduled end of the school year, and *American Indian* involved the revocation of charter schools' charters. Both of those injunctions maintained the clearly understood status quo *ante* before the defendant school district took the enjoined action; in this case, by contrast, Plaintiffs seek broad, variegated and far-reaching remedies that, while ignoring the inevitable impact of the pandemic itself, would alter many aspects of the District's program and operation, including the erasure of a CBA that has not caused the harm they allege, and does not pose an obstacle to any legitimate relief to which they may be entitled.

The conference scheduled for January 22, 2021, and the thorough report the parties

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must submit in advance addressing some 14 issues, are the appropriate occasion and means by which the entire litigation should be ordered and organized. Plaintiffs' desire to obtain injunctive relief in the spring of 2021 on their proposed schedule -- when all expect and hope there will be a completely different legal, educational and public health and safety landscape -- should not be advanced ahead of determining the propriety of proceeding in this fashion at all.[5] At bottom, "(i)njunctive relief is forward looking, not backward looking. If a condition that would have warranted the entry of an injunction has been cured and it is clear that the condition could not reasonably be expected to recur, then there is no basis to enjoin. *Feltenstein v. City of New Rochelle*, 254 F. Supp. 3d 647, 656 (S.D.N.Y. 2017) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 190 (2000)).)" *JT v. DiBlasio* 2020 U.S. Dist. LEXIS 212663 (S.D.N.Y. November 13, 2020). Similarly, "(a)n injunction should not be granted as punishment for past acts where it is unlikely that they will recur. (*Donald v. Cafe Royale, Inc*. (1990) 218 Cal.App.3d 168, 184)" *Choice-in-Education League v. Los Angeles Unified School Dist.*, 17 Cal. App. 4th 415, 422 (1993); *Madrid v. Perot Systems Corp*., 130 Cal. App. 4th 440.

[5] Indeed, in a November 2, 2020 Los Angeles Times article offered by Plaintiffs (Panish Decl., Ex. 24), it reports that "(Superintendent) Beutner announced on Monday that L.A. Unified is expanding from one-on-one in-person tutoring to groups of up to three — to reach more students. All participants, including teachers, will have to take a coronavirus test, even if they've had one recently. This gradual growth of in-person services is expected to reach several thousand of the district's 460,000 K-12 students. Health authorities allow in-person services to students with special needs, up to 25% of enrollment. The district also will be speeding up the in-person assessment of students with special needs and will allow sports teams to begin conditioning work — outside with physical distancing and no team drills. These expanded activities arise from new agreements with United Teachers Los Angeles, which represents teachers, nurses, counselors and librarians. The next two months need to be spent in an all-out effort to get ready for a hoped-for January opening, Beutner said. As part of that effort, L.A. Unified joined six other large California school districts Monday in calling on state and local officials to develop "a common standard of health, education and employee practices so schools have a clear path to open in the safest way." The districts called for "regular surveillance testing" for the virus among students and staff at no cost to participants or school districts. They also called for plans to help employees who would be at risk by returning to campus or who would put a family member at risk by doing so.

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465 (2005)(same).

PLAINTIFFS HAVE NOT COMPLIED WITH OR SATISFIED RULE 3.1200 *ET SEQ*

Rule 3.1200 *et seq* of the California Rules of Court governs the use of *ex parte* applications in this Court. Among other things, that rule requires the moving party to "make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." 3.1202(c)[6]. *Contemporary Services Corp. v. Staff Pro Inc*., 152 Cal. App. 4th 1043, 1061-1062 (2007*)* (Court did not abuse discretion in denying *ex parte* request to shorten time and conduct discovery in response to anti-SLAPP motion). Significantly, "(a) court will not grant *ex parte* relief "'in any but the plainest and most certain of cases.'" *Newsom v. Superior Court*, 51 Cal. App. 5th 1093, 1097 (2020) citing *People ex rel. Allstate Ins. Co. v. Suh* (2019) 37 Cal.App.5th 253, 257. (Court of Appeal disapproves superior court's *ex parte* order enjoining Governor's Executive Order relating to mail-in ballots because "the [moving] parties failed to present competent evidence establishing imminent harm from the Governor's executive order requiring immediate action.") There is no plain or certain basis for seeking *ex parte* relief in this case. The Court's November 17 stay order was intended to allow the parties and the Court to engage in orderly contemplation and prioritizing of next steps in this action, including early motions that could reshape or perhaps eliminate the action; discovery; the propriety and order of consideration of the class action aspects of the case; and other significant activity.

[6] While Plaintiffs provided email notice of their intent to seek *ex parte* relief on November 25, they did not serve their supporting papers until November 30 at 10:55 a.m.. Rule 3.1206 requires that "Parties appearing at the ex parte hearing must serve the ex parte application or any written opposition on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, no hearing may be conducted unless such service has been made." In light of their similar previous *ex parte* application filed in September and denied in October, and notice of intent five days before the hearing, it is questionable that their "first reasonable opportunity" to serve their papers didn't arrive until this date.

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Plaintiffs have not provided sufficient reason to short circuit that process, in light of the flaws in the pleadings and the profundity of the judicial intervention Plaintiffs seek, and the likely change in circumstances that the stakeholders will encounter by the time an injunction motion – if heard at all -- might be considered.

PROCEDURAL CHRONOLOGY

Plaintiffs filed this class action on September 24, 2020, and did not name UTLA as a defendant in their original complaint. On September 29, they filed a similar *ex parte* motion to the instant one, seeking to engage in expedited discovery and present a motion for preliminary injunction. On October 9, Judge Freeman continued the *ex parte* application "to a date to be determined, pending the Court's initial status conference with the parties." (October 9 ruling, p. 5). On that same day, Plaintiffs filed a First Amended Complaint that added UTLA to the pleading solely as a "Relief Defendant", stating they were not alleging UTLA committed any wrongdoing (FAC, ¶30). On October 19, Judge Freeman presided over a status conference, and denied the *ex parte* motion. On October 20, Judge Freeman recused himself *sua sponte*. After Judge Highberger was challenged peremptorily pursuant to CCP §170.6, the case was assigned to Judge Palazuelos, who issued a stay and Initial Status Conference Order on November 17. The stay says, in pertinent part:

> Pending further order of this Court, and except as otherwise provided in this Initial Status Conference Order, these proceedings are stayed in their entirety. This stay shall preclude the filing of any answer, demurrer, motion to strike, or motions challenging the jurisdiction of the Court. However, each defendant is directed to file a Notice of Appearance for purposes of identification of counsel and preparation of a service list. The filing of such a Notice of Appearance shall be without prejudice to any challenge to the jurisdiction of the Court, substantive or procedural challenges to the Complaint, without prejudice to any affirmative defense, and without prejudice to the filing of any cross-complaint in this action. This stay is issued to assist the Court and the parties in managing this complex case through the

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development of an orderly schedule for briefing and hearings on procedural and substantive challenges to the complaint and other issues that may assist in orderly management. This stay shall not preclude the parties from continuing informally exchange documents that may assist in their initial evaluation of the issues presented in this case. However, all outstanding discovery requests are stayed.

THE COURT'S STAY SHOULD REMAIN IN PLACE

As noted above, stays are routinely issued in complex cases such as this one, in order to allow the parties and the Court to take the time needed in advance of an Initial Status Conference to consider and provide for the multiple substantial issues they will confront once they embark on the path of litigation. The issues have to do with, e.g., management of a potential class action, the pendency of potential related class cases[7], "early crucial motions" such as demurrers and motions to strike, protective orders and discovery, as well as the overall litigation schedule. Especially in light of the holidays, and the closure of schools for the winter break, holding an Initial Scheduling Conference on January 22, 2021, with a submission of an ISC Report five days before as ordered, is reasonable and appropriate. The following discussion of at least some of the preliminary issues UTLA plans to raise will reinforce the appropriateness of that order.

STATEMENT OF ALLEGED FACTS

The Sideletters between UTLA and LAUSD

When the public initially became aware of the pandemic and the need for social distancing measures, LAUSD had to act quickly to limit the spread of the disease, which required balancing the educational and health needs of students with those of educators

[7] Those cases might include *J.T. v. DiBlasio*, Case No. 20-05878-CM (SDNY), in which plaintiffs brought a class action against all school districts in the country, claiming pandemic-related violations of the IDEA and other law. The Court dismissed that action, and raised similar questions about the propriety of class treatment as UTLA has raised in this action. 2020 U.S. Dist. LEXIS 212663 (S.D.N.Y. November 13, 2020). Another possible related class case is *Martinez v. Newsom* (Case No. 20-1796 DMG [C.D. CA]), a special education lawsuit complaining of pandemic-related violations, in which plaintiffs have sued every school district in California including LAUSD.

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and staff (totaling over 65,000 people), their families, and the broader community. Like most other school districts around the country, the District opted to implement a "distance learning" program wherein students and teachers would work from their homes. This regime placed additional burdens on all involved in the educational process, from students, to educators, to administrators, to parents.

The District's initial negotiations with UTLA resulted in a Sideletter to the parties' existing 2019-22 collective bargaining agreement ("CBA") signed in April 2020 (the "April Sideletter"). When it was clear distance learning would have to remain in place into the 2020-21 school year, the parties negotiated a new Sideletter (the "August Sideletter").[8] Crucially, the August Sideletter requires compliance with all provisions of SB 98, the bill enacted by the California Legislature in June 2020 to set statewide standards for pandemic distance learning. The August Sideletter also contains specific requirements for "minimum instructional minutes" for all students that match the standards set by SB 98.

Plaintiffs allege that the District's "educational program" does not meet the requirements of SB 98 and violates students' educational rights under the California Constitution. They have named UTLA as a "Relief Defendant" on the grounds that the August Sideletter itself is unlawful and must be invalidated or modified to remedy the alleged problems with the District's program. The FAC acknowledges that Plaintiffs "are not bringing any claims against [] UTLA," and only amended their complaint to add UTLA in response to LAUSD's argument that UTLA is a necessary party. FAC at ¶ 30. In a Joint Status Report, Plaintiffs disavowed any intent to seek discovery from UTLA.

Plaintiffs appear to fundamentally misunderstand the nature of the August Sideletter, CBAs generally, and their role in determining teachers' duties and District policies. The Sideletter, set to expire December 31, 2020, is an addendum to the CBA between UTLA and the District, which remains in effect to the extent it has not been

[8] A true and correct copy of the Sideletter is attached as Exhibit A to UTLA's Request for Judicial Notice ("RJN"), submitted along with its Demurrer and Motion to Strike.

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superseded. By their nature, these CBAs govern labor relations between the employer District and the Union representing educators; they are not intended to, and do not, comprise the entirety of the District's educational program.[9] The District is free to implement its own policies and practices so long as they do not alter the terms and conditions of employment for educators.[10]

Moreover, the FAC and Plaintiffs' memorandum improperly treat the CBA and Sideletters as the sole sources defining the minutiae of an educational day. (*See, e.g.*, FAC at ¶¶ 89 (asserting that the Sideletter "expects children to educate themselves" because independent student work is *one* element that teachers are permitted to utilize as part of students' "asynchronous instruction").) Especially in the new and challenging pandemic environment, the Sideletter does not purport to inventory all that teachers may be doing with and for their students and their parents. Plaintiffs grasp for a common policy or program that would lend commonality to the varied treatment and experience that one would expect across a school district as large and diverse as the LAUSD, and land on the Sideletter for that keystone. But the FAC's allegations relate much less to the specific provisions of Defendants' CBA, focusing instead on the day-to-day practical challenges associated with the new distance learning format that are not dictated by the Sideletter.

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[9] *See* Gov't Code § 3540 (the Educational Employment Relations Act, which governs educational employee labor relations, does not supersede the Education Code).

[10] Under the CBA, the District retains unilateral authority over "[t]he classes to be taught and the other duties and services to be rendered by District personnel to students and to the public, and the support services to be provided to employees and other District personnel; and the methods, personnel, and materials to be utilized in such services." (CBA), Art. III, Sec. 3.0(e). The District similarly retains authority over its "educational policies, objectives, standards, and programs, including but not limited to those relating to curriculum, textbook selection, educational equipment and supplies, admissions, attendance, student assignments, grade level advancement, student guidance, student testing, student integration, student conduct and discipline . . . and the type of extracurricular and co-curricular activities," subject only to a "consultation right" for UTLA. *Id.*, Art. III, Sec. 3.0(f).

Plaintiffs' Allegations Do Not Implicate the Sideletters and Are Not Amenable to Class Treatment

The FAC starts by describing individualized aspects of the plaintiff students' present level of achievement and existing learning deficits (FAC at ¶¶ 5, 46, 54, 56, 67), then moves to variables such as alleged difficulties in obtaining internet connectivity and computer hardware (FAC at ¶¶ 61, 62, 68, 132-137), to specific incidents where students received short instructional days or weeks (FAC at ¶¶ 83, 102), the District's alleged failures to adequately address attendance issues (FAC at ¶¶ 63, 64, 120), concerns related to allegedly insufficient synchronous instruction (FAC at ¶¶ 84, 85, 86, 90, 93, 94, 95, 96, 97, 120, 129-131), difficulties in gaining access to online District programs (FAC at ¶ 76), the alleged failure to provide promised instruction (FAC at ¶¶ 92), alleged low quality in education received (FAC at ¶¶ 103, 106, 108, 110), alleged limitations on interaction during synchronous learning (FAC at ¶¶ 104), the specific obstacles faced by special needs students (FAC at ¶¶ 64, 109), the alleged failure to provide accommodations the FAC characterizes as "easily" performed during distance learning (FAC at ¶¶ 65), the failure to support family involvement and prevent student disengagement (FAC at ¶¶ 118, 119, 122, 123), and finally, the alleged failure to require student assessments (FAC at ¶¶ 126, 127). Valid concerns, all. But these alleged flaws can only be evaluated on an individual student basis. Some of these issues were not even experienced by all the named Plaintiffs, and by the nature of the FAC, all were last reported some eight weeks ago or more.

The Plaintiffs' more recently dated declarations accompanying their *ex parte* application are vague as to the time frames of their observations, but acknowledge some changes and improvement as the semester continues (E.g., Heard Decl., ¶25, 26; Wroten Decl., ¶30; Martinez Decl., ¶12, 17; Solano Decl., ¶17)[11]. The variety of specific

[11] Plaintiffs filed for permission to submit the declarations under seal, redacting the names of the minor students involved in this litigation. UTLA has no objection, but must note that Plaintiffs placed their experts' declarations online months ago, and those experts' declarations mention the names of several of the students.

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circumstances underlying the alleged constitutional violations relating to each student plaintiff demonstrates that the violations are not amenable to class treatment. In such a case, a demurrer is an appropriate mechanism to test the viability of class action allegations. *Linder v. Thrifty Oil Co*. (2000) 23 Cal. 4th 429, 440; *Tjx Cos. v. Superior Court* (2001) 87 Cal. App. 4th 747, 752-53; *Clausing v. SFUSD* (1990) 221 Cal. App. 3d 1224, 1234.

Plaintiffs' claims will require individual analysis to determine whether their specific experiences in relation to, e.g., internet hardware and connectivity issues (if any), amount of overall instructional time, amount of asynchronous and synchronous learning, and quality of instruction, together constitute a violation of statutory or constitutional law. The LAUSD-UTLA Sideletter simply does not dictate these aspects of an individual student's educational experience, and thus does not bind together or unify the claims of the 500,000 putative class members, all of whom start from their own pre-established reception point, familial circumstances, and distinctive set of schedules and needs, and then have their own responses to their ongoing and changing experiences with educators, parents, and technology and equipment. There is simply no way to generalize or extrapolate from one student to another, from one classroom to another, from one school's students to another's, or from one grade to another. Hence, UTLA will demur to and move to strike the class action allegations in the First Amended Complaint.

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The Sideletters Do Not Violate the Education Code or the California Constitution

In order for Plaintiffs to prevail, they must show that the harms visited on students are an "inevitable" result of the particular policies they are challenging. (*Vergara v. State* (2016) 246 Cal. App. 4th 619, 649.) Here, nothing in the Sideletter – which states that it is intended to be in full compliance with the governing state pandemic education law, SB 98 (Education Code §§43501, 43503) -- inevitably mandates the alleged deficiencies of which Plaintiffs complain, or obstructs remedial relief, if any is warranted. Rather, the alleged harms to students that underlie Plaintiffs' constitutional claims all depend on *additional* individualized facts on the ground, such as a lack of connectivity and devices,

or individual teachers' alleged failure to comply with the Sideletter's and SB 98's minimum instructional minutes. As the California Supreme Court has noted, "[a]s a general rule, if a contract can be performed legally, a court will presume that the parties intended a lawful mode of performance." (*Redke v. Silvertrust* (1971) 6 Cal.3d 94, 102; *see also Kashani v. Tsann Kuen China Enterprise Co*. (2004) 118 Cal. App. 4th 531, 549. To the extent the District's actions or those of individual teachers have fallen short of the statutory requirements and are not otherwise explainable, their actions were inconsistent with the Sideletter, and any resulting injuries students may have suffered were not caused by it. Thus, Plaintiffs' statutory and constitutional claims do not provide any basis to invalidate the Sideletter, and UTLA will ask this Court to strike any request for relief involving modifying or eliminating the defending parties' collective bargaining agreements.

CONCLUSION

The Court's Initial Status Conference Order of November 17 and its accompanying stay are appropriate exercises of this Court's authority to manage complex cases like this one. As explained herein, the First Amended Complaint raises serious "crucial early issues" about the nature of any relief and the propriety of class treatment, that should be resolved prior to consideration of any substantive relief, such as the preliminary injunction Plaintiffs seek, and the concomitant discovery that they assert must precede such an equitable motion.

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Therefore, UTLA respectfully requests that this Court deny Plaintiffs' *ex parte* request for relief from the stay, and deny them the ability to engage in discovery or any other litigation activity until such time as the Court has had the opportunity to hold the Initial Status Conference.

DATED: November 30, 2020

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

KESHARA SHAW; ALMA ROSA FARIAS DE SOLANO; JOSUE RICARDO GASTELUM-CAMPISTA; MARITZA GONZALEZ; RONNIE HEARD, JR.; DEYANIRA HOOPER; JUDITH LARSON; VICENTA MARTINEZ; AND AKELA WROTEN, JR.,

Plaintiffs,

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT; AUSTIN BEUTNER, Los Angeles Unified School District Superintendent; and DOES 1-25, inclusive,

Defendant.

UNITED TEACHERS LOS ANGELES,

Relief Defendant.

CASE NO. 20STCV36489

PROOF OF SERVICE

Judge: Hon. Yvette Palazuelos
Hearing Date: December 1, 2020
Time: 8:30 a.m.
Dept.: 9

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 801 North Brand Boulevard, Suite 950, Glendale, CA 91203-1260.

On November 30, 2020, I served true copies of the following document(s) described as:

-UTLA'S OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION FOR EXPEDITED DISCOVERY IN SUPPORT OF PRELIMINARY INJUNCTION MOTION

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Bush Gottlieb's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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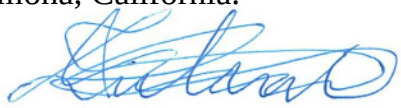

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